STATE OF MICHIGAN

IN THE SUPREME COURT

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MARK JAMES,

Plaintiff-Appellee,

and

AUTO-OWNERS INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

vs.

AUTO LAB DIAGNOSTICS & TUNE UP CENTERS and
FARMERS INSURANCE EXCHANGE,

Defendants-Appellants,

and

SECOND INJURY FUND/PERMANENT & TOTAL PROVISIONS,

Defendant-Appellee.

Supreme Court:
Court of Appeals Docket No: 257993
Lower Court : WCAC
Docket No.: 040002

128355

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PLAINTIFF-APPELLEE'S RESPONSE BRIEF TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF BASIS OF JURISDICTIONAL SUMMARY

Plaintiff-Appellee accepts as accurate and complete Defendant-Appellant's jurisdictional summary.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Issue I. WAS THE MAGISTRATE'S AND THE WCAC'S DECISION, FINDING PLAINTIFF WAS INJURED IN THE COURSE OF HIS EMPLOYMENT SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?

Plaintiff-Appellee states: "Yes"
Intervening Plaintiff-Appellee states: "Yes"

Issue II. SHOULD LEAVE TO APPEAL BE DENIED ON DEFENDANT'S ATTORNEY FEE QUESTIONS WHERE THEY ARE NOT PRESERVED OR IN THE ALTERNATIVE, WAS THE MAGISTRATE AND THE WCAC CORRECT IN AWARDING ATTORNEY FEES ON THE MEDICAL TREATMENT DEFENDANT-EMPLOYER/INSURANCE COMPANY REFUSED TO PAY?

Plaintiff-Appellee states: "Yes"
Intervening Plaintiff-/Appellee states "Yes"

REFERENCES

T-1	Refers to trial transcript dated May 19, 2003.
T-2	Refers to trial transcript dated June 6, 2003.
T-3	Refers to trial transcript dated June 16, 2003.
T-4	Refers to trial transcript dated October 22, 2003
I	Refers to the report of Dr. Richard Ilka.
DB	Refers to the medical report of Dr. James DeBoe.
MO	Refers to the magistrate's order.
WCAC	Refers to the Workers' Compensation Appellate Commission.

COUNTER-STATEMENT OF FACTS

Mark James (Plaintiff) was born on August 20, 1973, and was 29 years old at the time that he was last employed by Auto Lab Diagnostics and Tune-Up Centers of Coldwater (Defendant). At the time, Plaintiff was married, though he was in the process of divorcing at the time that this case was heard before Magistrate Kenneth Block in the Grand Rapids Bureau. He has one son, Magill James, date of birth September 8, 1999.

By way of background, Plaintiff is a high school graduate and completed two years of college at a technical institute regarding automobile and diesel technology. He also received a degree as an auto technician. (T 7-9) He has worked as an auto mechanic for most of his adult life and is certified by the State of Michigan in engine repair, brakes and air conditioning.

In August of 2001, after working for several other employers, Plaintiff commenced employment with Defendant, Auto Lab, advising the owner of that business, Mr. Randy Gable, that he was looking for a new job with better benefits, higher pay and regular raises. Mr. Gable testified that Plaintiff was a probationary employee, having to serve a 90 day probation and if he performed satisfactorily, he would get a raise, depending on whether or not he had good attendance, good work and was a go-getter. (T2 47; 55) Plaintiff testified that he could not exactly recall the amount of his hourly rate, it was either $17.00 or $18.00 per hour, and that he would be paid at least 30 hours per week or more depending on his out-put. In order to be paid the 30 hours or more, the employee had to work the complete week. (T2 43-44)

In calculating hours, Defendant was paid by the customer and Plaintiff was paid by the Defendant based on the "book rate" for each job. We are all familiar with how mechanics charge, that is, the book tells them how many hours a particular procedure should take and that is the amount

of time they apply against the hourly rate the shop uses. Generally speaking, a mechanic is always able to do the job in less time than the book rate calls for.

Both Plaintiff and Defendant's majority owner, Mr. Gable, testified that Plaintiff would be guaranteed a minimum of 30 hours per week, though Mr. Gable further explained that the 30 hours per week would be paid only in the event that Plaintiff worked his shift, which lasted from 8:00 a.m. to 6:00 p.m., with one hour off for lunch. They were required to work Monday through Friday and every other Saturday.

Plaintiff testified that occasionally they would have to work longer in the evening in order to complete the days work. Mr. Gable testified that the pay week lasted from Friday to Thursday and if an employee was not there one day, one day's portion of pay would be deducted from the 30 hour minimum. Anything that the employee worked above and beyond 30 book hours was paid to the employee over and above the 30 hours of calculated time. Plaintiff earned at least $510.00 per week ($17.00 per hour multiplied by the 30 hour minimum), or more throughout the course of his employment with Defendant. During the last week of employment, Plaintiff was credited with 30 hours of book time.

Plaintiff testified that he was employed as a certified technician with the Defendant, mostly working on engine repair, electrical systems and brakes. Plaintiff testified that he would use the OBD-II (OBD stands for On Board Diagnostics) in the course of his employment and that he would have occasion to "pull codes" from the on board computer of a customers vehicle, determine the nature of those codes, write it up on his work order that the car may need further diagnostic tests to be performed by one of the Defendant's diagnosticians. Plaintiff also testified that he had been trained in the use of the diagnostic system OBD-I and was familiar with the updated system, the

OBD-II. The OBD-II was a similar scanning tool, plugged into the on board computer in order to have the computer provide diagnostic information and/or codes which would suggest what type of work needed to be done or at least the areas to look at for problems.

The majority owner, Mr. Gable, approached Plaintiff and Mr. Brian Booher, a co-employee, and asked them whether they would be willing to attend a training seminar which was being held by the distributor of the OBD-II diagnostic system. Mr. Booher and Plaintiff agreed to attend the seminar and they were allowed to leave work early, go home, clean up, and then meet at either Auto Lab or Mr. Booher's home, depending on which witness is believed, and then travel together in the same car to Grand Rapids to arrive at the seminar, either at 6:00 or 6:30 p.m., again depending on which witness is believed.

Plaintiff and Mr. Booher testified that they were provided money for food and gas and Plaintiff further testified that Mr. Gable told them to keep the receipts for the food, transportation expenses and anything else they might require for the trip and he would reimburse them. This was a two day seminar and the plan was that Mr. Booher would drive on the first day and that Plaintiff would drive on the second day. They were going to go to the Grand Rapids hotel where the training session was being held and then return to the Coldwater area that evening, pick up Plaintiff's car and then go back to their separate homes. They were to return to work the next day, work until approximately 3:00 or 3:30 p.m. and then repeat the process.

All of the witnesses testified that Plaintiff was normally expected to work until 6:00 p.m., but they left early, with the boss's permission, so they could arrive in a timely fashion at the training seminar. It would be hard to argue that Mr. Booher and Plaintiff were not "on the clock" during the period of time that they were driving to Grand Rapids. They were required to work 8:00 a.m. to 6:00

p.m. and any hours less than that would normally result in a reduction of pay. However, that was not the case here because they were traveling to the seminar at the request of the employer and with his blessing, if not outright encouragement. All parties agree that the employer had paid for this seminar and that it was not free to the public. All parties also agree that Plaintiff was not required to pay for the seminar or reimburse the employer nor was he required to reimburse for the food and/or travel expenses that he received.

Magistrate Block indicated in his opinion on page 3, last paragraph, that he believed that the money to reimburse for gas and food was in fact an inducement or an incentive to Mr. Booher and Plaintiff to make the trip.

According to Plaintiff and Mr. Booher, shortly before 6:00 p.m., on October 24, 2001, several miles south of Grand Rapids, Michigan, the pair encountered severe weather. It was raining very hard which caused Mr. Booher's car to hydroplane on the heavy water on the road, skidding off the highway, striking a road sign which caused the sign to come into the compartment of the car and struck Plaintiff in the head. The blow caused a massive right skull fracture which resulted in spastic paralysis of the left upper extremity and flaccid paralysis of his left lower extremity as well as a cervical spine injury that resulted in a C5-6 fusion. He also sustained hearing loss in his right ear as well as additional injuries outlined in the medical reports that were admitted as exhibits. Defendants' experts both agreed that Plaintiff was totally and permanently disabled from any gainful employment and the magistrate found that as well. (I 8/25/03 and DB 8/27/03)

Mr. Booher, who was the driver of the motor vehicle, in his deposition of December 27, 2002, stated that the purpose of the training session was to provide technicians with updated information on the diagnostic systems and that as a result of completing the course, he and Plaintiff

would receive a certificate of completion. Mr. Booher further testified this system would allow him to get his job done quicker and that he would not have to ask one of the other diagnosticians to stop working and come over to assist him. The familiarity with the OBD-II system would allow the technician to work more effectively, quickly, accurately and provide a real benefit to the employer in terms of increased profits. (T1 25) Both Plaintiff and Mr. Booher testified that they were told that the seminar was worth attending and that Mr. Hammock, the minority owner of Auto Lab Diagnostic and Tune Up, indicated that he had gone to this OBD-II seminar 5 to 10 times in the past years and he thought the majority owner, Mr. Gable, had attended a like number of times.

Mr. Hammock also indicated that, generally speaking, the technicians did not like working together or helping each other because they were paid to do their own work and did not like being called away from their own work because they work on commission. (T1 91)

Mr. Hammock also testified that he would have gone to the seminar but for a prior engagement. (T1 92) He also indicated that the better you can do your job, the better it will benefit the owners or shareholders. (T1 95) Mr. Hammock and Mr. Gable both testified that employees that had attended the OBD-II training session in the past had been reimbursed for their travel expenses, food and the expenses of the seminar.

While there was a lot of testimony at trial as to whether or not Plaintiff would be able to use this updated OBD-II information, even Mr. Gable agreed that Plaintiff did do a great deal of electrical work and in performing such work, along with his engine repair work, there would be certain diagnostics that needed to be performed and that Plaintiff would be allowed to use the OBD-II system in order to produce diagnostic codes which could be used by other employees to create more work for the firm.

Mr. Gable also testified that it is important for mechanics in this field to continually update their skills because the cars and their systems are always changing. (T2 51) It should be noted that there was testimony that the Defendant's motto is "Test, Not Guess" and the mere fact that their name is Auto Lab Diagnostics emphasizes the fact that they test, rather than guess. As part of their overall advertising strategy, it is clear that the skill level and the technical expertise of their technicians is part of their overall marketing approach. Mr. Gable also testified that this training session provides skills that could be directly applied to his business. (T2 40)

The magistrate heard testimony on May 19, 2003, June 6, 2003, June 16, 2003, and finished the trial on October 22, 2003. He then issued an Opinion/Order dated November 26, 2003, indicating that Plaintiff was totally and permanently disabled as a result of this horrific injury and gave Plaintiff an open award of benefits. He also allowed the intervening Plaintiff, Auto Owners Insurance Company, to be reimbursed for the duplicative wage loss, medical and related expenses that it had paid. He also properly awarded an attorney fee of 30% on the medical, pursuant to cost-containment, to be paid by the Defendant's insurance carrier, Farmers Insurance Exchange, as well as the customary attorney fee on the wage loss benefits.

Plaintiff-Appellee, believes that the magistrate's opinion and the Workers' Compensation Appellate Commission's opinion is supported by competent, material and substantial evidence, on the whole record and should be affirmed.

COUNTER-STATEMENT OF QUESTIONS INVOLVED - I

DID THE MAGISTRATE AND THE WCAC CORRECTLY FIND THAT PLAINTIFF WAS IN THE SCOPE OF HIS EMPLOYMENT WHEN HE WAS CATASTROPHICALLY INJURED ON OCTOBER 24, 2001?

PLAINTIFF-APPELLEE, INTERVENING PLAINTIFF-APPELLEE AND THE COURT OF APPEALS STATE: "YES"

LAW AND ARGUMENT : QUESTION I

A. SCOPE OF REVIEW

Section 418.861a(14) states:

> The findings of fact made by the Commission acting within its powers, in the absence of fraud, shall be conclusive. The Court of Appeals and the Supreme Court shall have the power to review questions of law involved with any final order of the Commission, if application is made by the agreed party within 30 days after the order by any method permissible under the Michigan court rules.
>
> The scope of the WCAC's review is a limited one. A magistrate will not be reversed for choosing between two reasonably differing views.

The scope of the Appellate Commission's review is a limited one. A magistrate will not be reversed for choosing between two reasonably differing views. Fisher v Clark Equipment Company, 1990 ACO 352 and Couzzins v Motorwheel Corp., 1989 ACO 41. It is well within the magistrate's discretion to accept the lay and medical testimony he finds most persuasive as long as there is a reasonable basis for his findings. Miklik v Michigan Special Machine Company, 415 Mich 364 (1982) and Clark v Lakeview Community Nursing Home, 1992 ACO 189.

Even if Defendant's proposed interpretation of the testimony could constitute the requisite evidence of a finding such as proposed, such a determination would be inconsistent with the WCAC's charge on appeal. The WCAC's statutory duty on appeal is to review the record and

determine whether the findings of fact made by the magistrate are supported by competent, material and substantial evidence; not to make an independent determination of whether some different finding could also be supported. Lugo v Lansing Board of Water and Light, 1995 ACO 507; Pitts v General Motors Corp., 1989 ACO 189 and Holden v Ford Motor Co., 439 Mich 257, 267-268; 44 NW2d 227 (1992).

A magistrate's opinion must demonstrate "The path taken through the conflicting evidence, the testimony adopted, the standards followed and the reasoning used to reach his conclusion." Woody v Cello-Foil Products, 450 Mich 588 (1996). The magistrate is not required to explain away every aspect of evidence tending to militate against his decision. A discussion of the persuasive proofs leading logically to the ultimate determination is sufficient. Jaworowicz v Grayhound Lines, Inc., 1989 ACO 53. The Commission is not to search the record for support for findings that could have been made by the magistrate. The Commission is only to determine whether the findings actually made by the magistrate enjoy the requisite support for your affirmance. Pitts v General Motors Corp., 1989 ACO 189.

In this case, the magistrate's analysis fully comports with the requirements of MCL 418.847(2). The magistrate looked at a broad spectrum of proofs, both lay and medical, to reach his conclusion. He weighed those proofs reasonably and logically. There is competent, material and substantial evidence on the whole record to support the findings of this magistrate. MCL 418.861a(3). Based on those supported findings, the magistrate properly applied the law. His decision must therefore be affirmed. Jamison v General Motors Corp., 1987 ACO 598.

The WCAC acknowledged that they were to conduct a qualitative and quantitative analysis of the record to determine whether the magistrate's fact finding that the employer directly benefitted

from the employee's attendance at the seminar was supported by competent, material and substantial evidence on the whole record. They state on page 9 of their opinion that they did in fact conduct this review and they were convinced that the magistrate's findings are supported by the requisite evidence, although they also acknowledged that there was sufficient evidence in the record for a magistrate to make a finding contrary to Plaintiff's position. The WCAC did not want to disturb the magistrate's findings of fact, particularly as it applied to the credibility of witnesses. The WCAC stated they will not disturb a magistrate's findings on credibility unless the circumstances are such that the magistrate's findings in this regard fly in the face of a logical analysis of the testimony offered. The WCAC found as fact that the employer paid for or furnished transportation, they found as fact that the injury occurred during working hours, they found as fact that there was a specific benefit to the employer and they found as fact that there was excessive exposure to traffic risk that the Plaintiff-Appellee was exposed to. The WCAC agreed with the magistrate that the record supports all of these findings.

B. WAS THE PLAINTIFF IN THE SCOPE OF HIS EMPLOYMENT WHEN HE WAS CATASTROPHICALLY INJURED ON OCTOBER 24, 2001?

MAGISTRATE AND WCAC ANSWERED: "YES"

Injuries sustained going to and from work may be compensable if there is a sufficient nexus between the employment and the injury to warrant conclusions that the injury was a circumstance of employment. Stark v L.E. Myers Co., 58 Mich App 439; 228 NW2d 411 (1975).

Considerations relevant to the ultimate determination of whether an injury to an employee while on the way to work is sufficiently employment-related to be compensable are:

1. Whether the employer paid for or furnished employee transportation;

2. Whether the injury occurred during or between working hours;

3. Whether the employer derived a special benefit from the employee's activities;

4. Whether the employee was subjected to excessive exposure to traffic risks.

In this case, the magistrate answered all four questions with a definite yes.

1. EMPLOYER PAID FOR TRAVEL

The magistrate found as **fact** that the employer agreed to and did reimburse Mr. Booher and Plaintiff for their travel and food expenses related to this trip. (T1 23) The employer also paid for the cost of this training. The testimony was that the employer had previously paid for or reimbursed for the travel, food and cost of training sessions for other employees. (T2 38). The magistrate found as **fact** that food and gas money served as an incentive to attend the training session. (MO 3)

2. DURING WORK HOURS

The magistrate found as **fact** that the injury occurred during work hours. The Plaintiff was required to work from 8:00 a.m. to 6:00 p.m. The employer allowed Mr. Booher and Plaintiff to leave work early, clean up, meet up again and drive to Grand Rapids for their training. The accident occurred before their normal quitting time of 6:00 p.m. Plaintiff was "on the clock" at the time of the injury. Had the employer not requested the pair attend this training, Plaintiff would not have been injured, but rather would have been performing other activities, as requested by his employer.

3. SPECIAL BENEFIT

The magistrate found as **fact**, that the employer would have derived a special benefit from Plaintiff's training with the OBD-II scanner. (MO 3)

The employer acknowledged that their television advertising included the slogan "We Test, Not Guess". The name of the employer, "Auto Lab Diagnostics", suggests a level of expertise to the

customers that they would get from their diagnostic and testing approach to auto repair, which would not typically be found in your neighborhood garage.

The magistrate did not believe the owners testimony when they down-played the importance of this diagnostic training. The more believable testimony came from Plaintiff and Mr. Booher that there would be a benefit in this training which was immediately applicable on the job. Both individuals testified they used the diagnostic scanning tool, for this employer, and that it was helpful and provided a direct benefit in terms of increased speed, efficiency and accuracy. This testimony was believed by the magistrate. (T1 25-28)

By using the tool, Plaintiff would sometimes create additional work for his fellow mechanics with this employer, if the tool showed a problem that the vehicle owner was unaware of and that would directly benefit the company with increased revenues. In this line of work speed, accuracy, limited returns and additional work all equal increased profits for this employer which is a clear and direct benefit.

4. EXCESSIVE EXPOSURE TO TRAFFIC RISK

There can be no doubt that this two hour trip, the majority of which was in "rush hour traffic" in a driving rain storm, contributed to Mr. Booher's loss of control causing Plaintiff's injury. This trip was six times longer than their normal commute. The magistrate's opinion demonstrated "The path taken through the conflicting evidence, the testimony adopted, the standards followed, and the reasoning used to reach his conclusion." Woody , supra. In this case, the magistrate's analysis fully comports with the requirements of MCL 418.847(2).

The magistrate properly distinguished the case of Camburn v Northwest School District, 459 Mich 471; 592 NW2d 46 (1999). In Camburn, supra, the magistrate found:

1. The school did not pay for the seminar;

2. The seminar was closer to plaintiff's home than the school where she regularly taught;

3. The principal did not ask the teacher to attend the seminar;

4. The school did not pay for her transportation expenses or food;

5. The principal testified there was no tangible benefit through this seminar; and

6. The injury happened before her normal work hours at the school.

Plaintiff, Mark James, testified he believed he was offered another dollar an hour if he attended. (T1 25)

Contrast that with our case in which the magistrate found:

1. The employer paid for the training session, and paid for other employees who had attended the same training, numerous times before;

2. The seminar was two hours from Plaintiff's home, which is six times further than his usual commute. The trip was also made in rush hour traffic, in a driving rain storm, which contributed to Mr. Booher's loss of control which caused Plaintiff's Injury;

3. Plaintiff was asked by the co-owner to attend. Plaintiff was on probation as a new employee and his raise would have been based on his knowledge, work ethic, willingness to keep current on ever changing auto models, diagnostic techniques, etc.;

4. The company paid for Plaintiff's travel expenses and food;

5. The magistrate found that this training would have been a direct benefit to this employer; and

6. This injury happened while Plaintiff was "on the clock" being paid by his employer and between his normal work hours.

Our case is more closely aligned with the Supreme Court's decision in Bush v Parmenter, Forsythe, Rude, Dethmers, 413 Mich 444; 320 NW2d 858 (1982). In that case, an attorney was

attending a seminar in another city and later died when shot in the head after a seven and a half hour deviation from his trip, the seven and a half hours of deviation being spent within a few miles of his home.

The court recognized that an employer must bear the risk of one complete round trip when an employee is engaged in a trip of **special benefit** to the employer. In the Bush, supra, case, the partner in the law firm participated in a seminar, his travel and seminar expenses were paid by his firm, his attendance was approved by his boss (managing partner).

The court held this to be within the course of his employment while traveling to, attending and returning from the seminar because the lawyer was, in effect, on a special mission. Compensation was only denied because the deviation was so great and involved risk unrelated to his business so as to dwarf the business portion of the trip.

Plaintiff does not have a deviation problem. Mr. Booher and Plaintiff drove directly from Coldwater, Michigan, to Grand Rapids, Michigan. They never stopped along the way and the injury occurred during business hours, while Plaintiff was "on the clock", and they were almost to their business destination. This was a business trip, there was no social or recreational activities remotely associated with it. It is clear that the magistrate arrived at the proper decision, finding Plaintiff's injury occurred in the course of his employment.

Intervening Plaintiff-Appellee, Auto Owners Insurance Company, does an excellent job in their Workers' Compensation Appellate Commission brief pointing out the fact that it is the Defendant who misconstrues *Camburn*, not the hearing magistrate. I am not sure I can improve on the arguments they made regarding the *Camburn* case and therefore I will just quote it and incorporate it by reference:

"The issue of whether Plaintiff's injuries arose out of and in the course of employment, then, presents a mixed question of law and fact, *Koschay v Barnett Pontiac, Inc,* 386 Mich 223, 225; 191 NW2d 334 (1971), *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994), under which the magistrate's factual findings are entitled to §861a(3) deference.

Discussion

In this case, the magistrate considered the two-part test appearing in *Camburn v Northwest School District supra*, found one of the two prongs clearly to have been met by the proofs at trial, and ultimately concluded that "'[a] sufficient nexus between the employment and the injury" existed in the case "so that it may be said that the injury was a circumstance of the employment.'" (Mag. Opinion, p.3, *quoting, Thomas v Staff Builders Healthcare*, 168 Mich App 127, 130; 424 NW2d 13 (1988), *lv den,* 430 Mich 886 (1988)). In this regard, the magistrate's analysis was legally correct and fully supported by the factual record.

In its appeal, Defendant argues that the "two-part test" discussed in the *Camburn* for seminar-travel cases erects two independent hurdles both of which must be satisfied in all instances for a claim to succeed. The opinion, however, cannot be so construed. Prior case law calls for a fact-intensive weighing of various employment relationship factors, *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444; 320 NW2d 858 (1982); *Stark v L E Myers Co*, 58 Mich App 439; 228 NW2d 411 (1975), and far from overruling these precedents, *Camburn* retains this fact-based analysis on the ultimate issue of whether Plaintiff's participation in the seminar had such a "connection with the employment" as to render the injury compensable as an incident of employment.

The passage in *Camburn* on which Defendant relies (Block-quoted twice in Defendant-Appellant's Brief, pp. 6,7) refers to the two "prongs" from Professor Larson's treatise -- (1) was the employer directly benefitted by the employee's attendance; and (2) was attendance compulsory or at least definitely urged or expected as opposed to merely encouraged? -- and then states, "Even if defendant was directly benefitted by plaintiff's intent to attend the seminar, substantial evidence supports the magistrate's conclusion that attendance was neither compulsory nor definitely urged or expected. Instead, it was merely encouraged, and, as such, was not an incident

of employment." *Camburn*, 459 Mich at 478. There are several reasons why this brief passage cannot be constructed as overruling prior precedent and establishing a bright-line, two element litmus test in cases such as these.

Preliminarily, the passage is dicta. The hearing magistrate in *Camburn* found as fact that the teacher-claimant had established neither a direct benefit to her employer nor that she was required, expected or urged to attend the seminary; and the Appellate Commission upheld these findings of fact. Not surprisingly, the Court of Appeals affirmed, as did the Supreme Court. 459 Mich at 476-477. Accordingly, whether clearly establishing one of the two prongs of the "two-part test" would have rendered the claim compensable was not an issue before the Court. Indeed, not only is the subject passage on which Defendant relies dicta, but it is not even particularly persuasive dicta, since it contains no critical analysis whatsoever. (Recall, too, as a practical matter, that this passage was not authored by the Supreme Court, but is merely a passage within the Court of Appeals' opinion that was adopted wholesale by the Court.) Defendant's contention that this passage, in one sweeping stroke of the pen, effectively overrules *Bush, supra,* is without merit. (*See*, Defendants Auto Lab Diagnostics and Farmers Insurance Exchange's Response Brief, 4/1/04, p.2..)

More importantly, however, Defendant's interpretation of *Camburn* as creating a strict two-hurdle litmus test is contradicted by the broader discussion within *Camburn* itself. In its discussion and quotation of Professor Larson's treatise (as quoted within *Marcotte v Tamarack City Volunteer Fire Dep't*, 120 Mich App 671; 327 NW2d 325 (1982)), the *Camburn* opinion focuses on the "employment connection" as being the critical element, and *both* the degree to which the employer required or encouraged participation in the seminar *and* the extent to which the employer would benefit from such participation are to be weighed *together* to reach a *single* conclusion on whether the requisite "employment connection" is established:

> As to the attending of conventions, institutes, seminars, and trade expositions, compensability similarly turns on whether claimant's contract of employment contemplated attendance as an incident of his work. ...

> Employment connection may be supplied by varying degrees of employer encouragement or direction. The clearest case for coverage is that of a teacher who is directed to attend a teacher's institute. It is also sufficient if attendance, although not compulsory, is "definitely urged" or "expected," but not if it is merely "encouraged." **Connection with the employment may also be bolstered** by the showing of a specific employer benefit, as distinguished from a vague and general benefit, as when an automobile mechanic at an examination given by the manufacturer permitted the dealer to advertise "factory-trained mechanic."

Camburn, 459 Mich at 477-478 (*quoting*, Larson treatise, as quoted in *Marcotte, supra*) (emphasis added).

The Court's approval of this passage -- under which a direct benefit experienced by the employer may "bolster" an otherwise deficient employment "connection" -- forecloses Defendant's interpretation of the "two-part test" and instead requires that the two prongs of the test be weighed together.

Indeed, Defendant's interpretation (that meeting one prong but not the over will never suffice) is clearly untenable. Suppose an employer specifically insists and even *requires* that the employee participate in a particular seminar -- thus seemingly making the "employment connection" clear -- and yet no particular benefit to the employer is established by the evidence. Under Defendant's reading of *Camburn's* "two-part test," an injury claim arising out of this employee's attendance at the seminar would fail. The better reading of *Camburn* (and Larson, quoted therein) is that the "employment connection" would be clearly established so as to render the injury an incident of the claimant's employment.

This Appellate Commission has applied *Camburn* in line with this approach of weighing and balancing the factors and not, as Defendant argues, as a strict two-element litmus test. In *Reiniche v Wal-Mart Stores, Inc.*, 2001 ACO #64; 14 Mich Workers' Comp Law Rep ¶1305 (2001), an employee of the defendant participated in a Labor Day parade, in which the defendant had entered a "float" as a matter of civic pride. The employee was neither required nor even urged to participate, but was most "merely encouraged" to do so, and

she was not paid for her time. She claimed benefits for the injuries she sustained when she fell off of the float. The magistrate construed *Camburn, supra,* as controlling and denied the claim.

The Appellate Commission reversed and held that the work-centered nature of the employee's activity -- particularly the extent to which the employer derived a direct benefit from the activity -- required a finding of compensability.

> We have no disagreement with the magistrate's determination that defendant employer only encouraged participation in a voluntary activity. Indeed, we fully accept the magistrate's understanding of the underlying facts in this case. [Footnote omitted.] However, as a legal matter, we believe the magistrate should not have centered his conclusion as heavily on the matter of the non-required nature of plaintiff's activity.[3] Most important, from our point of view, he should have gone further and given greater legal weight to the heavily work-centered nature of the activity in which plaintiff was engaged at the time she was injured.
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>
> [3] The magistrate analyzed a number of factors relevant to the disposition of the question of "arising out of and in the course of," but he placed particular emphasis on the voluntary nature of plaintiff's activity at the time of the injury.

Reiniche, supra (emphasis added).

The Appellate Commission in *Reiniche,* in essence, found the magistrate's analysis in that case to be faulty on the very grounds Defendant urges in the case at bar; too much tunnel-visioned emphasis on the "voluntary" nature of the plaintiff's activity at the time of injury (attending the OBD-II seminar) without proper consideration o the heavily work-centered nature of the overall endeavor. Indeed, the dissenting opinion in *Reiniche,* far from disputing the majority's insistence that all the "unique facts" and "factual variables" need to be considered, took exception to the majority upsetting the magistrate's factual findings. The dissent

specifically agreed that the inquiry is heavily fact-based and requires a weighing of all factors.

> I agree with the majority that this is not a "clear cut case" and is in fact "a very close call." However, cases which are "very close" call for appellate restraint in favor of the magistrate's findings[.]

Reiniche (Martell, C., Dissenting).

In the case at bar, Magistrate Block avoided the error found in *Reiniche* -- his opinion fully considers that Plaintiff's participation in the OBD-II seminar was "merely encouraged," but also fully considers all other aspects of the heavily work-centered nature of the endeavor.

As detailed herein (and in the magistrate's opinion itself), Plaintiff (along with his fellow technician, Brian Booher) was offered to attend the two-day, 8 hour seminar, at Defendant's expense. The reason Defendant had them attend, as opposed to saving the seminar "credits" for other technicians to use later, was that Defendant would receive a direct benefit from Plaintiff's increased understanding of OBD-II in the form of increased profits and reduced "comebacks," directly benefitting the company's reputation (Mag. Opinion, p. 3). Plaintiff was "on the clock" at the time of his injury (*id.*, p. 4), and was facing a risk of injury substantially and undeniably increased beyond that of his usual commute-to-work risk in that the drive was two-hours long (and would have been two-more hours back afterwards) through a perilous rain storm (*id.*).

In sum, the magistrate properly analyzed this "arising out of and in the course of" issue with regard not only to the extent to which Plaintiff's participation in the seminar was voluntarily but also as to all aspects of its importance to Defendant, as a uniquely factual inquiry, to properly conclude that a sufficient "employment connection" was established (*Camburn*, at 477-478) to entitled Plaintiff to compensation. This Commission should uphold the findings of the hearing magistrate and affirm the award of benefits."

This request for leave to appeal should be denied. It is unworthy of the Supreme Court. The magistrate and the WCAC correctly quoted the law that applies to this case and also the law that applies to appeals from the magistrate to the WCAC. The Defendant-Appellant is unhappy with the fact finding by the magistrate and the WCAC. The WCAC found that the magistrate's analysis fully comports with the requirements of MCLA 418.847(2). The magistrate looked at a broad spectrum of proofs, both lay and medical, to reach his conclusion. He weighed those proofs reasonably and logically. There is competent, material and substantial evidence on the whole record to support the findings of the magistrate and also to support the WCAC in upholding the magistrate's findings.

COUNTER-STATEMENT OF QUESTION PRESENTED II

SHOULD LEAVE TO APPEAL BE DENIED ON DEFENDANT'S ATTORNEY FEE QUESTIONS WHERE THEY ARE NOT PRESERVED OR IN THE ALTERNATIVE, WAS THE MAGISTRATE AND THE WCAC CORRECT IN AWARDING ATTORNEY FEES ON THE MEDICAL TREATMENT DEFENDANT-EMPLOYER/INSURANCE COMPANY REFUSED TO PAY?

PLAINTIFF-APPELLEE, INTERVENING PLAINTIFF-APPELLEE AND THE COURT OF APPEALS STATE: "YES"

LAW AND ARGUMENT - QUESTION II

A. SCOPE OF REVIEW

Plaintiff-Appellee, Mark James, accepts the thoughtful and scholarly statements and arguments made by Intervening Plaintiff-Appellee, AUTO OWNERS, in their brief to the Court of Appeals and incorporates by reference and quotes the following:

"Intervening Plaintiff-Appellee, AUTO OWNERS, accepts Defendant's statements regarding the standard of review as accurate (Application for Leave to Appeal, p. 9), and incorporates by reference its own earlier statement of the standard of review (*supra,* pp.7-8).

It is further observed, however, that issues not raised before the hearing magistrate and Appellate Commission are not preserved and should not be addressed by the courts in a further appeal, *Mudel*, 462 Mich 719-720. Further, an affirmative position taken by a party in the lower court cannot be thereafter attacked by that same party on appeal; the contrary position, rather, is deemed to have been waived. *Schulz v Northville Public Schools*, 247 Mich App 178, 181 n. 1; 635 NW2d 508 (2001); *Phinney v Perlmutter,* 222 Mich App 513, 544; 564 NW2d 532 (1997); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Discussion

As its second issue raised by application to this Court, defendant asserts that its liability for attorney fees should be reviewed, claiming that the Appellate Commission "failed to consider or resolve issues duly raised before it in that regard" (Defendant's Application for Leave to Appeal, p.9). Yet the issues are not properly before this Court, or to the extent review has not been waived, substantial grounds for challenging the lower tribunals' decisions are not presented.

Defendant's principal claim is that MCL 418.315(1) does not allow for an award of attorney fees to be assessed against the defendant-employer. Case law is to the contrary. As Defendant acknowledges in its Application, the existing precedent is that the statutory language "may permit the assessment of a[n] attorney fee against a defendant." (Defendant's Application for Leave to Appeal, p.10). In its application, Defendant seeks to challenge that existing case law.

Defendant is not in a position to do so, however, for two reasons. First, as Defendant frankly acknowledges, it never raised this issue at either the hearing level or in its appeal to the Workers' Compensation Appellate Commission (Application for Leave to Appeal, p.13, n.2). The issue, therefore, has not been preserved and should not be reviewed. *Mudel*, at 719-720.

Defendant, however, did not merely remain silent on the issue of whether §315(1) authorizes an award of attorney fees. Defendant affirmatively represented to both lower tribunals that discretion *is* accorded the magistrate to award attorney fees against the employer, and only claimed that, in this case, a full award should not be given.

In its brief to the Appellate Commission, Defendant pointed to the text of §315(1) as not allowing attorney fees based on a claimant's award of wage loss benefits, but acknowledged that medical expense reimbursement, on the other hand, does form the basis for statutory recovery of

attorney fees (Defendant's Brief on Appeal to the WCAC, 3/8/04, p. 19)[4] After quoting the statute ("...The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee"), Defendant argued that an attorney fee should not be awarded in this case, but affirmatively acknowledged that, under the statute, "this fee may permit the result plaintiff seeks" (i.e., an attorney fee award in the amount of 30% of the reimbursed medical expenses) (Defendant's Brief on Appeal to the WCAC, 3/8/04, p. 19). Notably, the identical assertions and acknowledgments were made to the hearing magistrate by Defendant (Trial Brief of Defendant Auto Lab/Farmers, 11/21/03, p. 3).

Having affirmatively acknowledged to the lower tribunals that the statute in question, §315(1), does permit an award of attorney fees to be assessed against a defendant-employer based on medical expense reimbursement, Defendant cannot now take a contrary position in this appeal to the Court of Appeals. The issue not only has not been preserved, it has been waived. *Schulz v Northville Public Schools,* 247 Mich App at 181, n. 1; *Phinney v Perlmutter,* 222 Mich App at 544; *Dresselhouse v Chrysler Corp*, 177 Mich App at 477.

Defendant's remaining challenges to the award of attorney fees concern not the statutory entitlement to receive attorney fees, but whether, on the particular facts of this case, the magistrate should have been deemed, in essence, to have abused his discretion. Given the uniquely consistent

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4 *Watkins v Chrysler Corp,* 167 Mich App 122; 421 NW2d 597 (1988); *Nezdropa v Wayne County* 152 Mich App 451; 391 NW2d 440 (1986); *Duran v Sollitt Construction Co*, 135 Mich App 610; 354 NW2d 277 (1984); *Zeeland Community Hospital v Vander Wal,* 134 Mich App 815; 351 NW2d 853 (1984); *Boyce v Grand Rapids Asphalt Paving Co*, 117 Mich App 546; 324 NW2d 28 (1982).

application of the statute by the workers' compensation bureau, however, in compensating successful claimants with a 30% attorney fee award, and the magistrate's acceptance of the detailed grounds advanced in the brief submitted by Plaintiff-Appellee (*see*, Magistrate's Opinion, pp. 5-7; adopted by Appellate Commission at WCAC Opinion, pp. 4-6), the magistrate clearly acted within his statutory discretion in allowing attorney fees to be recovered based on the medical expenses ordered to be reimbursed."

Section 315(1) of the Act, which provides for the payment of medical expenses by an employer, states that the magistrate "may pro-rate attorney fees at the contingent fee rate paid by the employee." It has been argued that this section gives the Bureau the authority to require the hospitals or doctors involved to pay a proportionate share of the attorney fee. This argument was rejected in Boyce v Grand Rapids Asphalt Paving Co., 117 Mich App 546; 324 NW2d 28 (1982). The court held that the healthcare providers could not be required to pay a share of the attorney fee because it had not retained the attorney.

Attorneys have always been permitted to calculate their fees from the total recovery, including the recovery of medical expenses. As the Appeal Board pointed out in Jenkins, Nystrom & Sterlacci, P.C. v Blue Cross and Blue Shield of Michigan, 1983 WCABO 218, 233-237, such an application of the rule would be clearly contrary to the policy the legislature set out in Sections 315 and 821 of the Statute. The last Section of 315(1) clearly indicates that the legislature intended to allow the magistrate to order that an attorney fee be pro-rated between the employee and someone else. If Boyce , supra, stands for the proposition that the "someone else" may not be the provider of medical services, the only other alternative is the employer. Furthermore, the language of the court found troublesome in Rule 14(5) was eliminated in 1979.

In two more recent cases, the Court of Appeals has followed the decision in Boyce, holding that medical providers may not be required to pay that portion of the plaintiff's attorney fees attributable to recovering medical expenses. Both cases also follow the suggestion that the Statute be interpreted to require the defendant-employer to pay those attorney fees. Duran v Sollitt Construction Co., 135 Mich App 610; 354 NW2d 277 (1984); Zeeland Community Hosp. v Vander Wal, 134 Mich App 815; 351 NW2d 853 (1984); also see Nezdropa v Wayne County, 152 Mich App 451; 391 NW2d 440 (1986).

Following those cases, the Commission has generally held that an employer may be required to pay an attorney fee on the portion of an award that is attributable to the recovery of medical benefits. See Stankovic v Kasle Stell Corp., 2000 Mich ACO 124, 13MIWCLR 1528 (2000); Sikkema v Taylor Carving, Inc., 1992 Mich ACO 469, 5 MIWCLR 1394 (1992). Fees are calculated at the percentage rate provided in the rules, not on an hourly basis. Baker v Pemco Die Casting Corp. ,2000 Mich ACO 449, 14 MIWCLR 1050 (2000).

In the case of Joseph Celletti, et al v Fiat Auto USA, Inc., et al, 1999 Mich ACO 46, our own Mr. Michael J. DePolo was representing Lake States Insurance Company as the intervening plaintiff. This was a case where plaintiff was injured in a rollover accident when a semi truck forced him off the highway. Intervening plaintiff, Lake States Insurance Company, paid plaintiff no-fault medical and wage loss benefits. The matter was then adjudicated to be a work-related injury. The magistrate ordered the workers' compensation insurer or defendant-employer Fiat, to reimburse the no-fault carrier for monies it had paid on plaintiff's behalf that were related to the motor vehicle injury. The only mistake that was made in that case was that the reimbursement was limited to the cost-contained medical expenses paid by the no-fault carrier. In a recent decision by the Michigan

Supreme Court in Auto Owners Insurance Company v Amoco Production Company, 468 Mich 53; 658 NW2d 460 (2003), the Michigan Supreme Court held that the no-fault insurer is entitled to invoke the doctrine of equitable subrogation and to stand in the place of its insured to recover full reimbursement from defendant for the reasonable medical expenses it paid on behalf of the insured. The Michigan Supreme Court reversed the Court of Appeals which had limited the no-fault carriers reimbursement to the amount set forth in the workers' compensation cost-containment rules.

The Celletti, supra, case would have been exactly on "all fours" had the plaintiff's attorney in the case made a timely request for attorney fees. They rejected plaintiff's request for attorney fees by stating the request was untimely because the plaintiff did not make a claim for attorney fees and reimbursed amounts at the original trial. They pointed out that had this issue been raised at the initial trial it would have been included in the judge's decision. The Commission should note that Plaintiff's Petition requested attorney fees and it was re-visited at trial.

Based on the case law and Section 315(1), it is clear that an award of an attorney fees is appropriate and that the appropriate party to pay said attorney fee, would be Defendant, Auto Lab Diagnostics, and their work comp insurer, Farmers Insurance Exchange. In the alternative, we would request that the Defendant, Auto Owners Insurance Company, the first party no-fault carrier, pay the bill. I raise this only to preserve this issue on appeal should some subsequent case decide that the auto no-fault carrier should pay the attorney fee as opposed to the workers compensation carrier. I believe the more appropriate rule would be that the employer/workers' compensation insurer pay the fee. Our local magistrates have consistently held that if an employer refuses to pay the medical bills which are ultimately found to be compensable, an attorney fee of 30% is appropriate.

Specifically in the Baker, supra case, the Appellate Commission held that an hourly rate

which had been awarded to plaintiff's attorney, Timothy Kragt, was inappropriate. The magistrate had awarded Mr. Kragt an attorney fee at the rate of $125.00 per hour for the 44 hours of work that he had performed. The Appellate Commission felt that the award of attorney fees was appropriate in that case, however the only proper way to do it was to award the plaintiff's attorney a fee at the contingency fee rate of 30%.

The WCAC stated on page 10 of their opinion that the Defendant did not dispute that attendant care is a medical expense within the intendment of MCLA 418.315(1) and the Workers' Disability Compensation Act. The WCAC properly concluded that Plaintiff's attorney is entitled to a 30% fee on medical expenses and attendant care and if the parties are unable to resolve this issue, the parties may return to the magistrate to resolve the issue of reimbursement of attendant care. The WCAC went on to state that they are affirming the magistrate's opinion with the exception of an award of attorney fees to Plaintiff's counsel for the recovery of wage-loss benefits. In this particular case, it is a relatively small part of the case because the magistrate and the WCAC believe that a 30% attorney fee is applicable based on the amount of cost-contained medical expenses. I believe the magistrate felt an attorney fee would be appropriate on the wage loss benefits as a general rule because he could foresee cases, different from this case, where there is a minimal amount of medical expenses and the majority of the claim is strictly a wage loss claim. For example, in a death case where there is no medical because of instantaneous death, the only claim would be for death benefits for the survivors. If a plaintiff's attorney was not allowed to take a 30% attorney fee on the wage loss benefits, then the attorney would have no way of being paid, assuming first-party death benefits are being paid by the no-fault carrier. The magistrate correctly assumed that it would be virtually impossible to get an attorney fee from a surviving plaintiff or from the decedent's

dependents, since the no-fault carrier was paying wage loss benefits which have now been spent by the surviving plaintiff or the decedent's dependents.

It would seem reasonable that an attorney fee would equally apply on the wage loss benefits as well as the medical.

Substantial grounds for granting review of the Appellate Commission's partial affirmance of the hearing magistrate's award of attorney fees in this matter have not been presented. Accordingly, leave to appeal should be denied.

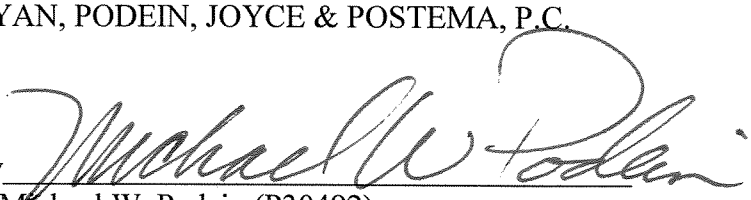
RELIEF SOUGHT

Plaintiff-Appellee respectively requests the Supreme Court deny Defendant-Appellant's request for leave to appeal. The magistrate, the WCAC and the Court of Appeals correctly decided this case.

Respectively Submitted,

Dated: April 19, 2005

RYAN, PODEIN, JOYCE & POSTEMA, P.C.

By 
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